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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	
Requests of U S West Communications, Inc. for Interconnection Cost Adjustment Mechanisms	CC Docket No. 97-70 (97-90) CCB/CPD 97-12

REPLY COMMENTS OF ICG TELECOM GROUP, INC.

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ICG Telecom Group, Inc. ("ICG"), a subsidiary of ICG Communications, Inc., hereby files its reply comments on the Petition for Declaratory Ruling and Contingent Petition for Preemption filed on February 20, 1997 (the "CLEC Petition") by Electric Lightwave, Inc., McLeodusa Telecommunications Services, Inc., and Nextlink Communications, L.L.C. (collectively, the "CLEC Petitioners"). ICG supports the CLEC Petitioners' request for a Commission ruling that U S West Communications, Inc. ("U S West") cannot recover its network upgrades through state-imposed "Interconnection Cost Adjustment Mechanism," or "ICAM," surcharges on its potential competitors or customers.

I. INTRODUCTION AND SUMMARY

This proceeding is the product of U S West's attempt to circumvent the clear language and intent of the competitive entry sections of the Telecommunications Act of

1996 and to use its proposed ICAM surcharge to foist on its competitors its costs of expanding and improving its network to prepare for the advent of competition. As shown below, the Commission can and should act to prevent this from happening by issuing the declaratory ruling sought by the CLEC Petitioners.

At the outset, the Commission should make clear that before U S West is entitled to any recovery of its alleged costs, it must catalog and justify those costs. The vague categories of costs that U S West has described make it impossible to determine if the costs that U S West seeks to recover are legitimate. U S West also has the burden of proving that it is not already recovering the costs at issue here through other charges already in place.

In the event that U S West is able to show that some of the costs that it seeks to recover are legitimate and justifiable, the Commission should -- as the great majority of commenters urge -- make clear that U S West is not entitled to recover those costs from its competitors. The commenters differ as to why this is the case, some taking the position that Section 252 affirmatively precludes recovery of the network upgrade costs in question, others that U S West is already recovering those costs through Section 252. All agree however that U S West's proposed ICAM surcharge is inconsistent with Section 252.

ICG believes that the first view as to why U S West is precluded from recovering its general network upgrade costs from its competitors is correct for three reasons. First, Section 252 states clearly that the price charged to new entrants for interconnection, network elements, and resale shall be limited to the cost directly attributable to the new

entrant, not the costs of rearranging and upgrading incumbent local exchange carrier ("ILEC") networks generally. Second, if U S West is allowed to unilaterally impose its ICAM surcharge on its competitors, it would render the negotiation/arbitration process put into place by Section 252 meaningless. Third, the Commission's implementing rules confirm that Section 252's pricing standard does not permit recovery of U S West's network upgrade costs from its competitors. TELRIC assumes an efficient, multi-carrier network and any costs external to that model are by design excluded from recovery.

Despite the fact that U S West's ICAM proposal flies in the face of Section 252, the ILEC commenters contend that the Commission is without jurisdiction to act, arguing that Section 252 gives the states sole responsibility over pricing. The ILECs, however, mischaracterize the nature of the declaratory ruling sought by the CLEC Petitioners. The competence of the states is not at issue here. Instead, the declaratory ruling would serve to curtail U S West's abuse of state processes. U S West should not be permitted to force its competitors to litigate its violation of federal law in fourteen separate state proceedings.

The Commission should issue a declaratory ruling that if U S West has any legitimate network upgrades, the appropriate vehicle for recovery of those costs is general rate cases filed in each of the states where U S West believes its total recovery is inadequate. Costs allegedly left unrecovered under TELRIC cannot be simply added incrementally to other costs being recovered from competitors or ratepayers.

II. U S WEST CANNOT IMPOSE ITS PROPOSED ICAM SURCHARGE ON ITS COMPETITORS

A. U S West Has Failed To Show That The Costs It Seeks To Recover Are Legitimate And Justifiable

At the outset, as several commenters noted, it is far from clear that there is any legitimate basis for the costs that U S West seeks to recover through the imposition of its proposed ICAM surcharges. First, the costs that U S West seeks to recover are, at best, vaguely described. U S West has nowhere sought to catalog with any precision the costs it intends to include in the ICAM surcharges. Rather, it merely enumerate three very general categories of costs[1] and reserves the right to add additional categories as it sees fit.[2] It is thus impossible to determine if the costs that U S West seeks to recover are legitimate. Second, while some of the costs that U S West seeks to include in its ICAM surcharge could *possibly* be legitimate, it is impossible to determine if those costs are really the product of competitive entry or if they would have been incurred in the normal course of U S West's network expansion.[3] Clearly, U S West's competitors cannot be required to foot the

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[1] Those general categories are: (1) software changes to enable it to service requesting CLECs; (2) expansion of network capacity in its tandems and interoffice facilities in order to accommodate anticipated CLEC traffic demands; and (3) establishment of service centers to process CLEC service orders. See U S West's Petition for Declaratory Ruling and Request for Agency Action, filed January 3, 1997 before the Public Service Commission of Utah, at 2-3 ("U S West Utah Petition"), a copy of which is attached to the CLEC Petition.

[2] Id. at 9.

[3] See, e.g., Comments of MCI at 3 ("MCI Comments").

bill for U S West's general network upgrades.[4] Finally, U S West has made no demonstration that it is not already recovering the costs at issue here through other charges already in place. Before U S West can be allowed to recover its network upgrade costs, those costs must be "fully documented, cost justified, and not duplicative of any other rate element."[5]

B. Section 252 Precludes Recovery Of Network Upgrade Costs From Competitors

Even if some of the ICAM surcharge costs are legitimate and reasonable, nearly all the parties filing comments in this proceeding -- with, predictably, the exception of the ILECs -- agree that U S West is nevertheless not entitled to recover those costs by imposing a surcharge on new entrants. The commenters differ, however, as to why this is so, falling broadly into two groups.

In the first group are those, including ICG, who believe that Section 252 affirmatively limits U S West's cost recovery from its new competitors to the cost of the interconnection, unbundled network elements, or resold network functions (collectively, "Competitors' Services") that U S West actually provides to those competitors. Section 252 excludes from recovery the general network upgrade costs that U S West would

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[4] The commenting parties variously refer to these costs as "network upgrade costs," "network expansion costs," "network rearrangement costs," "onset costs," etc. Whatever the label, the key point is that such costs are incurred as part of U S West's ongoing expansion and improvement of its network and are not attributable to a particular new entrant or group of entrants.

[5] Comments of Sprint Corporation at 9 ("Sprint Comments").

include in its proposed ICAM surcharge.[6] These latter costs must be recovered from ratepayers generally since the costs are attributable to network upgrades or the general costs of implementing competition; in either event, ratepayers in general are the beneficiary.

The second group consists of those who believe that the costs U S West seeks to recover are already included in Section 252's pricing standard. Therefore, any surcharge designed to recover those costs would result in double recovery for U S West, and a doubling of its competitors' costs.[7]

ICG believes that the plain language of Section 252 makes clear that the first of the two schools of thought as to why U S West should be prohibited from imposing its ICAM surcharge on its competitors is correct. Section 252 states clearly that the price charged by ILECs to new entrants for Competitors' Services "shall be . . . based on the cost (determined without reference to rate-of-return or other rate-based proceedings) of providing the interconnection or network element." 47 U.S.C. § 252(d)(1)(A). The focus on the cost of the specific "interconnection" or "network element" being provided to the new entrant makes clear that the ILECs' general network upgrade costs cannot be included in the price.[8] In other words, Section 252 permits the imposition on competitors of only

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[6] See, e.g., Comments of ICG Telecom Group, Inc. at 4-5 ("ICG Comments"); Comments of the Telecommunications Resellers Association at 4 ("TRA Comments"); Comments of Cox Communications, Inc. at 4; Sprint Comments at 4-7; MCI Comments at 4.

[7] See, e.g., Comments of American Communications Services, Inc. at 3-4; Comments of Teleport Communications Group Inc. in Support of Petition for Declaratory Ruling at 3-9 ("Teleport Comments").

[8] As ICG noted in its initial comments, U S West itself agrees with this reading of (Footnote continued)

those costs directly attributable to them, not the costs of rearranging and upgrading ILEC networks to prepare for competition generally. To argue otherwise is to stretch the clear statutory language of Section 252 too far. As ICG and several other commenters pointed out,[9] by excluding network upgrade costs (and all other costs in excess of the costs of supplying the discrete element in question) from the pricing standard of Section 252, Congress made clear that new entrants should not be required to pay those costs. State-imposed ICAM surcharges on new entrants would, in effect, represent an end-run around that Congressional policy determination.

Allowing U S West to proceed with its ICAM proposal would also undermine the negotiation and arbitration process set out in Sections 251 and 252. Section 251(c)(1) creates the duty for incumbent carriers to negotiate in good faith the terms and conditions of competitive entry. Section 252 provides that if those negotiations fail, the various state public utility commissions must then step in to arbitrate the disputed issues. Section 252 and Section 251 are designed to ensure that new entrants seeking to compete with entrenched ILECs have a fair opportunity to do so by spelling out clear entry procedures and pricing standards. As GST states, U S West's ICAM proposal would "circumvent this process by creating an interconnection charge established at [U S West's] sole discretion

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(Footnote continued)
Section 252. U S West acknowledges that the extraordinary "network rearrangement" costs that U S West seeks to recover through the imposition of its proposed ICAM surcharge are outside of the scope of costs recoverable under Section 252. See ICG Comments at 5.

[9] See, e.g., TRA Comments at 3-5; Sprint Comments at 3; MCI Comments at 2.

with no limit and no regulatory oversight."[10] Essentially, U S West seeks authority to write itself a blank check drawn on its competitors' accounts. After going through negotiations and perhaps arbitration with a requesting carrier and arriving at a schedule of prices agreed to by both parties and acceptable to the state PUC, U S West would be able to unilaterally alter those prices through an ICAM surcharge imposed on its competitor. This renders the negotiation/arbitration process meaningless.

The effect of allowing U S West to sidestep the negotiation and arbitration process will be to erect a significant barrier to competitive entry in that new entrants will be forced to make the decision whether to enter a particular market without having a critical piece of pricing information. All new entrants will know is that they are potentially subject to enormous entry fees unilaterally set by their competitor. Moreover, as AT&T points out, the ILECs are all too aware of this and will have every incentive to frontload as large a portion of their costs as possible into ICAM-like surcharges to deter competitive entry.[11]

The Commission's implementing rules serve to make even clearer that the Section 252 pricing standards exclude the network upgrade costs that U S West seeks to recover through its proposed ICAM surcharge. The TELRIC pricing model adopted by the Commission assumes the existence of an efficient network, designed to carry multi-carrier traffic based on network facilities that use the most efficient technology in use

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[10] Comments of GST Telecom at 6 ("GST Comments"). See also Teleport Comments at 7.

[11] See Comments of AT&T Corp. at 7-8.

at the ILECs' current wire center locations.[12] In other words, TELRIC makes an efficient, multi-carrier network the appropriate baseline for the recovery of incremental costs. Any costs external to that model, i.e. costs incurred by an inefficient ILEC, or costs to "upgrade" the network to accommodate multiple carriers, are by design excluded from recovery. Thus, U S West's general network upgrade costs that it seeks to include in its proposed ICAM surcharge clearly cannot be recovered from CLECs under Section 252.

* * *

While their rationales may differ, the majority of commenters support the CLEC Petitioners' and ICG's view that the Commission cannot allow U S West to impose on its competitors its proposed ICAM surcharge. The network rearrangement costs that U S West seeks to recover through the ICAM surcharge are either excluded from recovery from new entrants under Section 252, as ICG believes, or are already included in TELRIC. Accordingly, the Commission must act to prevent U S West from stifling competition through its proposed ICAM surcharges.

III. THE COMMISSION CAN AND MUST ACT TO PREVENT U S WEST FROM ABUSING STATE PROCESSES

It is imperative that the Commission take expeditious action to prevent U S West from imposing its anticompetitive surcharge on its competitors. The ILEC commenters claim, however, that the Commission is without jurisdiction to act. They advance two related reasons why this is so. First, the ILECs argue that Section 252 confers

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[12] Interconnection First Report and Order, ¶ 685 (TELRIC assumes "that the reconstructed local network will employ the most efficient technology for reasonably foreseeable capacity requirements").

all authority over pricing for Competitors' Services to the states, to the exclusion of the Commission.[13] Second, the ILECs argue that because the 8th Circuit has stayed the Commission's pricing rules, even if the Commission would otherwise have had jurisdiction, it is now powerless to act pending the lifting of the stay.[14] The ILECs, however, miss the mark on both counts.

While ICG does not disagree that the states have the key role of policing the actual rates set for Competitors' Services, it does not follow that the FCC has no role in the process. Sections 251 and 252 place in the hands of the FCC the task of adopting regulations to implement the Congressional policies embodied in those sections. It is also the Commission's responsibility to ensure, pursuant to Section 253, that no barriers to competitive entry are erected at the state level. Thus, while the FCC has limited authority over the prices established through the Section 251/252 negotiation and arbitration process, it does have authority, and an affirmative duty, to grant the relief requested by the CLEC Petitioners.

In any case, the ILECs mischaracterize the nature of the declaratory ruling sought by the CLEC Petitioners. A declaratory ruling that U S West cannot sidestep the federally-imposed requirements of Sections 251 and 252 by seeking to gain at the state level what it is prohibited from recovering at the federal level would not, as the ILECs

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[13] See, e.g., Joint Comments of Bell Atlantic and NYNEX at 1-2 ("Indeed, under the Act, cost recovery issues are to be addressed in the first instance by the States, not the Commission.").

[14] See, e.g., Comments of Southwestern Bell Telephone Company, Pacific Bell and Nevada Bell at 3 ("[T]he Commission is legally estopped from attempting to preempt any state cost recovery/rate structure solution to the matters at issue here . . . .").

contend, represent a power grab from the states. The competence of the states to act is not the issue here.

Instead, the declaratory ruling sought by the CLEC Petitioners would serve to curtail the abuse of states processes by U S West and the other ILECs who will no doubt follow in U S West's footsteps. U S West seeks to recover costs that federal law prohibits it from recovering from competitors. If those competitors are forced to litigate the issue in each of U S West's fourteen states, while it is clear that it will ultimately lose, U S West will nonetheless have succeeded in delaying the advent of competition and making competitive entry more costly. For this reason, "[a] declaratory ruling by the Commission that ICAM is fundamentally inconsistent with the [1996 Act] would greatly aid state Commissions and new entrants confronted [with U S West's ICAM] proposals."[15] The Commission should send a clear signal that U S West cannot stand in the way of real, effective, competition.

IV. U S WEST IS ENTITLED TO RECOVER ITS LEGITIMATE NETWORK UPGRADE COSTS, IF ANY, ONLY THROUGH THE GENERAL RATEMAKING PROCESS

To the extent that U S West can demonstrate that its network upgrade costs are legitimate and justifiable, the proper vehicles for recovery of those costs are general rate cases filed in each of its states.[16] Since end users are the ultimate beneficiaries of

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15 GST Comments at 10.

16 See ICG Comments at 11-12.

competition, it is appropriate that they bear the cost of the network upgrades necessary to open U S West's network to competitive entry.[17]

U S West, however, seek to circumvent normal ratemaking principles and isolate new entrants for recovery of its general network upgrade costs. The Commission should make clear that Section 252 precludes U S West from doing so. As ICG and the other commenters have demonstrated, the plain language of Section 252 limits what U S West can recover from its competitors to the cost of the Competitors' Service that U S West actually provides. U S West cannot be allowed to sidestep the limitations of Section 252 and recover through state-imposed surcharges on its competitors what it cannot not recover from them directly.

More fundamentally, in its effort to recover its network upgrade costs from its competitors through state-imposed ICAM surcharges, U S West relies on traditional approaches to cost recovery. However, the forward-looking, economic, cost-based TELRIC pricing methodology that the Commission adopted to implement Section 252 represents an intentional departure from traditional models that permit the recovery of historical and embedded costs. While U S West *may* be entitled to recovery of its network upgrade costs, any such recovery must come wholly outside of its recovery under TELRIC. Given the different nature of the TELRIC and historical/embedded cost recovery approaches, any attempt to simply add alleged unrecovered costs related to providing service to CLECs to the revenue requirement derived under an historical/embedded cost

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[17] As Sprint states, "[c]ompetition in the local services market is expected to benefit end users generally in the form of lower prices, higher quality, and a wider variety of services." Sprint Comments at 6.

model will inevitably result in a misallocation of some costs. Costs allegedly left unrecovered under TELRIC cannot be simply added incrementally to other embedded/historical actual costs being recovered from ratepayers. Rather, the adequacy of the cost recovery under an historical/embedded analysis must be examined as part of the total revenue picture. To the extent that U S West desires additional cost recovery, it must show that it has legitimate, justifiable costs not being recovered by its total revenue, including the revenue generated from new competitors. Only in a general rate case, not an isolated ICAM proceeding, can such scrutiny occur.

V. CONCLUSION

For the reasons shown above and in ICG's initial comments, the Commission should expeditiously grant the CLEC Petition and issue a declaratory ruling that:

1. To the extent that U S West has alleged "network upgrade" or other costs not recoverable under Section 252(d), those costs are not recoverable as a surcharge on its competitors or otherwise, because such recovery would be inconsistent with the 1996 Act and would not be competitively neutral.

2. The appropriate relief, if any, is for U S West to institute a general rate case in each state where it believes that its network upgrade costs are not being adequately recovered.

3. Any such rate case filed by U S West must be governed by general ratemaking principles. Cost recovery should come in the form of an adjustment to U S West's general rates, not as a surcharge on its competitors or on end users.

4. U S West must continue to fulfill its statutory obligations under the 1996 Act to provide access to its network to new entrants.

Dated: April 28, 1997

Respectfully submitted,

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